



STATE OF INDIANA

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October 1, 2010

Mr. Steven A. Meyer
Hoosier Environmental Council
3951 N Meridian, Suite 100
Indianapolis, IN 46208

*Re: Informal Inquiry 10-INF-42; Small Group Meetings Conducted by
Officials from the Indiana Department of Transportation*

Dear Mr. Meyer:

This is in response to your informal inquiry submitted on behalf of the Hoosier Environmental Council ("HEC") regarding the Indiana Department of Transportation ("INDOT"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion. My opinion is based on applicable provisions of the Indiana Open Door Law ("ODL"), I.C. § 5-14-1.5-1 *et seq.*

BACKGROUND

In your inquiry, you state that you have received reports that INDOT officials have been holding "Small Group Meetings" throughout Monroe County concerning possible road closures related to the I-69 interstate construction project. You allege that one such meeting occurred on September 16, 2010. INDOT Deputy Director Sam Sarvis attended that meeting, which was held for the purpose of addressing "concerns about how local road closures will affect local residents, emergency responders, and school bus service." Similar meetings occurred on September 20th, 21st, and 22nd, and more meetings are scheduled for individual roads, some emergency responders, and some school boards. To your knowledge, INDOT has not provided any public notice of these meetings. The HEC and its partners are concerned about these meetings because they believe all citizens of Monroe County should have the opportunity to attend the meetings, because the informal meetings "provide the appearance of public engagement without the assurances that come with a formal meeting that the feedback will be incorporated into INDOT's decision making process," and because holding separate meetings for each possible closure "disguises the tough choices Monroe County residents face about which of the[] roads should be closed."

INDOT General Counsel Mark Ahearn responded to your complaint. Mr. Ahearn denies that INDOT violated the ODL. He states that no governing body of INDOT conducted a meeting subject to the ODL because the individual INDOT staff members and contractors who attended the small group meetings referenced in your inquiry do not meet the definition of a governing body. INDOT has neither formed any committee, board, or other entity for the purpose of conducting the meetings nor appointed or delegated authority to a committee to take official action with respect to the small group meetings. He argues that the individual staff members and contractors held the meetings “with a variety of individuals and groups in the ordinary course of business,” and takes the position that “[w]orking together on the same project or toward a common goal does not transform a group of individuals into a governing body within the meaning of the ODL.” He further argues that a contrary result “would be tantamount to requiring compliance with the notice requirements of the ODL any time any employee of a state or local agency interacts with a citizen or member of the public. Surely, the legislature did not intend such a result.”

Mr. Ahearn notes that INDOT will continue to provide opportunities for all citizens to contribute to the I-69 project. He says that INDOT is happy to schedule an appointment with members of HEC to listen to any concerns they might have. Finally, he notes that INDOT is committed to compliance with all applicable legal requirements and, as such, INDOT temporarily suspended any additional small group meetings pending a legal review of the situation.

ANALYSIS

The General Assembly enacted the ODL intending that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, so that the people may be fully informed. I.C. § 5-14-1.5-1. Accordingly, the ODL requires that, except for those situations where an executive session is authorized, “all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them.” I.C. § 5-14-1.5-3(a). The plaintiff in a lawsuit under the ODL has the burden of proving that the defendant entity is a “public agency” within the meaning of the statute. *Perry County Dev. Corp. v. Kempf*, 712 N.E.2d 1020 (Ind. Ct. App. 1999).

By its terms, the ODL applies only to meetings of “governing bodies” of public agencies:

- (b) "Governing body" means two (2) or more individuals who are:
 - (1) a public agency that:
 - (A) is a board, a commission, an authority, a council, a committee, a body, or other entity; and
 - (B) takes official action on public business;
 - (2) the board, commission, council, or other body of a public agency which takes official action upon public business; or
 - (3) any committee appointed directly by the governing body or its presiding officer to which authority to take official action upon public

business has been delegated. An agent or agents appointed by the governing body to conduct collective bargaining on behalf of the governing body does not constitute a governing body for purposes of this chapter.

I.C. § 5-14-1.5-2(b). The ODL defines a “meeting” as “a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business.” I.C. § 5-14-1.5-2(c). The Indiana Court of Appeals has analyzed these provisions of the ODL and determined that they do not apply to meetings of staff members of public agencies if the staff members themselves do not constitute a governing body:

As originally enacted, the Open Door Law applied only to meetings at which "a majority of the governing body" of a public agency was in attendance. The legislature never intended Sec. 3 to apply to gatherings of agency employees conducting the “internal staff operations of public agencies.” See *The Open Door Laws: An Appraisal of Open Meeting Legislation in Indiana*, 14 Val.U.L.Rev. 295, 309 (1979-80). Gatherings of employees of public agencies were not then and are not now specifically mentioned as being covered by the Act.

Indiana State Bd. of Health v. State Journal-Gazette Co., 608 N.E.2d 989, 991 (Ind. Ct. App. 1993). The Court of Appeals reasoned that if the result were otherwise, large state agencies would have to convene a majority of their staff members -- which would often number in the hundreds or even thousands -- in order to conduct a “meeting” under the ODL:

If the definitions [of “governing body” and “meeting”] were to be literally applied in the case before us, it would require the presence of 544 of the ISBH's 1,087 full time state employees to convene a “meeting” subject to the Open Door Law. Such an interpretation in this or any similar case is clearly absurd. The legislature did not intend such a result. . . . Clearly, the amendment is inartfully worded. Because the amendment is ambiguous and of doubtful meaning, we must construe it to give effect to the true intent of the legislature in this regard.

Id. at 993 (internal citations omitted). In *Indiana Department of Health* (“IDH”) case, two employees of the IDH gathered and engaged with other individuals while taking action upon public business. However, neither employee was a member of the 11 member Indiana State Board of Health (“ISBH”), the governing body of the IDH, nor were they members of any advisory committee directly appointed by that board. As a result, the Court of Appeals determined that the meeting was not one conducted by any “governing body” of the IDH, nor was it a meeting of any advisory committee directly appointed by the ISBH. As a result, it was not subject to the ODL. *Id.*

Similarly here, if the staff members of INDOT who gathered with members of the community at the meetings are not members of a governing body of INDOT or some other public agency, and no majority of any other governing body was present at the meeting, the ODL did not apply to the meetings. It is my understanding that the INDOT

officials do not sit on any governing body subject to the ODL. Consequently, it is my opinion that INDOT did not violate the ODL.

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, sweeping initial 'A'.

Andrew J. Kossack
Public Access Counselor

cc: Mark Ahearn